

**The California Commission
on Health and Safety
and Workers' Compensation**



**DRAFT Summary of November 17, 2006
CHSWC Return-to-Work Roundtable**

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December 8, 2006

Summary of CHSWC Return-to-Work Roundtable

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Summary of November 17, 2006 CHSWC Return-to-Work Roundtable

Background

Research supports the observation that return-to-work (RTW) at the earliest appropriate time reduces the long-term wage loss of an injured worker and costs borne by employers.

Earlier Commission on Health and Safety and Workers' Compensation (CHSWC) studies by RAND found that California consistently had poor RTW rates for permanent workplace injuries when compared with other states. California's injured workers are far more likely to be out of work after their injury, and in the long run, the benefits could not compensate the resulting lower earnings. Assembly Bill (AB) 227 and Senate Bill (SB) 899 provided rules and programs that encourage employers to offer work to their injured employees. These programs include monetary incentives to return the injured worker back to work, Supplemental Job Displacement Benefit (SJDB) vouchers, and the RTW workplace modification reimbursement program. (See *Attachments A and B*)

At the request of CHSWC Chair Angie Wei, CHSWC staff held a RTW roundtable meeting on November 17, 2006, in Oakland, to discuss the operational and technical aspects of the return-to-work program. (See *Attachment C* for the Agenda and a listing of the roundtable attendees.) Prior to the meeting, a packet of information was sent out to participants, which included an explanation of RTW benefits and programs (*Attachment D*) and information on the timing of RTW benefits (*Attachment E*).

The roundtable involved 30 stakeholders of the workers' compensation system representing insured and self-insured employers, labor, insurance carriers, medical providers, and attorneys. The discussion centered on identifying the current issues with respect to RTW in California, as well as identifying potential solutions.

Among the areas identified in advance of the roundtable were:

- 1. Timing of the vouchers.** The current statutes provide for vouchers very late in a claim, because the vouchers amounts can only be determined after an award of permanent partial disability (PPD) benefits.
- 2. Disability rights.** State and federal laws (FEHA and ADA) require the employer to engage in a timely, good faith interactive process with the injured worker to determine reasonable accommodations. These requirements need to be coordinated with workers' compensation claims. (See *Attachment F*)
- 3. Return-to-work reimbursement.** State law authorizes the Division of Workers' Compensation (DWC) to reimburse eligible employees to make workplace modifications to accommodate an injured employee's return to modified or alternative work.

4. **Notices.** Requirements for notices need to be clarified and coordinated. These include: notices about final temporary disability (TD) benefits; initial PD benefits; potential rights to a voucher; the interactive process to determine reasonable accommodations; offers of regular, modified, or alternative work; eligibility for a voucher; and 15% increased or decreased PD benefits.
5. **Carve-Outs.** Statutes need to be updated to require that workers' access to SJDB vouchers are not diminished in a carve-out.

Meeting Process

The meeting began with introductions followed by a presentation by Seth Seabury of RAND Corporation. Mr. Seabury shared preliminary results of a survey of 40 large California employers with RTW programs.

Among the points made was that use of RTW programs has been rising since 1980 and before many of the recent reforms or incentives. By 2000, 75% of the sampled employers had a RTW program, defined either as an informal program, a written program, or a written program with rules. Characteristics of RTW programs varied, with modified tasks being quite common, but modified equipment and modified work schedules being far less common. The effects of the RTW programs on costs varied in this preliminary study, with some support for modified tasks and less certainty for other changes. It was noted that employer provision of some form of healthcare could lead to reduced costs.

After setting the tone with research on RTW programs, participants were asked to offer their view of what is the most critical need for improvement in the RTW system in California. They were asked about the barriers and opportunities, with a plan to review possible solutions.

The participants discussed both technical problems with the current 15% PD adjustment incentive and the SJDB voucher, as well as larger systemic problems with RTW.

Goals and Priorities

- Early intervention
- Accountability of all participants
- RTW (direct placement) with at-injury employer as first choice
 - This requires management buy-in
 - Small employers need assistance
- RTW with any employer (training and placement)

Issues Discussed

The main issues discussed during the roundtable include the following:

Role of the Physician

- Need for physicians to be more aware of the wider need of patients, including RTW (as presented by Dr. Wiesner of Kaiser Permanente citing an ACOEM Guideline September 2006 article entitled “Preventing Needless Work Disability by Helping People Stay Employed”).
- Lack of time and/or financial incentives for physicians to take on the issue of RTW with their patients.
- Physicians should be aware of needs of employees and employers regarding RTW.
- Medical reports are delayed and are often received too late to meet the SJDB deadline.
- Physicians are not sufficiently trained on AMA Guides, which are used to determine impairment ratings and related incentives to RTW.

Offers of RTW

- To avoid liability for the voucher, the timing of an offer of work based on the ending of TD can be too early, because the employee could still be recovering in transitional work.
- Medical report delays prevent employers from understanding work restrictions and offering work within the deadlines.
- With temporary workers, employers cannot offer 12 months of work.
- Some employers are willing and not able; others are able and not willing.
- Employees not offered work where employer-employee relationship is not good; vouchers may be used a pretext to terminate older workers or unwanted workers.
- Difficult for small employers to offer RTW.

Vouchers

- Unclear whether a C&R is an award, for purposes of determining time frame for providing the voucher.
- Unclear whether voucher is required when the employee leaves, retires, or is terminated.
- Unclear whether voucher required when there are work restrictions but no ratable PD
- Vouchers are not working, so most parties settle instead
 - May not be successful without some of the mechanisms that were in VR.
 - There is no maintenance allowance for the worker.
- Vouchers have no time limit or expiration date.

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- Statutory employers (such as temp agencies) are required to pay voucher even if employee gets another job.
- The twelve-month timeline to offer modified work is not compatible with the job descriptions of daily hires (e.g., agricultural and entertainment industries).

PD Adjustment, 15% increase or decrease

- The 15% adjustment does not create sufficient incentive for employers to offer work.
- Sometimes PD has already accrued before the deadline to offer work, so there is no incentive to offer work.
- The timeframe of the PD incentive is not well coordinated with the SJDB voucher deadlines.

Fair Employment and Housing Act (FEHA)

- Improved coordination is needed between workers' compensation and FEHA/ADA requirements.
- Deadline to offer work may cut off the interactive process.

Small Business Issues with RTW

- RTW laws are focused only on the at-injury employer.
- Small/medium size employers lack resources to implement RTW programs.
- Employers do not know where to start, particularly small businesses.
- Coordination between workers' compensation and FEHA/ADA protections is lacking.
- Poor relations hinder the RTW process (i.e., some companies use the injury as an opportunity to lay off older workers or other "problem employees" and some injured employees drag out the process with no intention of returning to work).
- Insured employers do not directly experience the reduction in workers' compensation liabilities that self-insured employers experience, so most of the existing incentives have no direct effect on insured employers. Incentives are needed that will reach insured employers.

Roundtable Recommendations

Participants at the roundtable came up with many short-term and long-term technical and systemic recommendations to the RTW process, including:

Short-Term Suggestions

- Establish educational programs for employers
 - Educate about the DWC reimbursement program.
 - Information (e.g., sample programs, policies, procedures), database, and mentors.

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- Train physicians
 - To understand that what makes the injured worker happy is not necessarily what's right for the worker.
 - To address RTW issues using ACOEM "Preventing Needless Disability" guideline.
 - How to use the AMA guides.
- Technical changes need to be made regarding the SJDB and tiered PD benefit. These include coordinating:
 - Deadlines and timing of notices, such as notices of potential right to SJDB.
 - Eligibility criteria for the offers of regular, modified, or alternative work.
 - Timing of the offer of regular, modified, or alternative work.
 - Timing of the PD adjustment of 15%.
 - Timing of the SJDB voucher.
- Conduct needs assessment on RTW practices for small and medium-sized business.
- Incentivize physicians to spend the time needed to assist in the RTW process. (e.g., reimburse them for completing a functional capacity evaluation form).
- Create outcome-based medical fee schedules (pay for performance).
- Require that necessary medical care be authorized promptly; do not require UR if treatment follows the ACOEM guidelines.
- Extend the TD ending date (e.g., limit the aggregate weeks of payment instead of limiting the period of payment), so worker is motivated to attempt RTW.
- Explore how to specify requirements involving
 - Seasonal and temporary employment (e.g., farm workers, entertainment industry, daily hires)
 - General and special employment

Long-Term Suggestions

- Consider mentoring role between large companies with RTW programs and small companies without these programs in place.
- Assess the adequacy of the funding of the RTW reimbursement fund.
- Provide employers with an "off-the-shelf" RTW solution, or guide for what an RTW program should look like.
- Assess the need for publicity about the reimbursement fund for worksite modifications at employers with fewer than 50 employees. Most employers do not know about this fund.
- Consider the ends and means of compliance with the process requirements versus RTW outcomes that are not being facilitated or coordinated.
- Explore additional resources to fund RTW.

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- Redesign the existing RTW and voucher system potentially using funds from existing programs and redirecting them to a more functional program.
- Examine sources of funding for RTW programs. Suggest funding to include redirecting current funding and looking for additional funds.
- Examine best practices in early intervention programs and pre-injury management for RTW.
- Examine other states' programs, such as the RTW programs in Oregon and Texas.
- Examine California State Department of Rehabilitation programs for possible coordination with workers' compensation.
- Examine California State Department of Fair Employment and Housing programs for possible coordination with workers' compensation.
- Explore incentives/support for job placement, including services and/or resources from Department of Rehabilitation, the Labor and Workforce Development Agency and CalJobs.
- Consider an integrated disability-management approach to treating injuries.
- Separate the medical-treatment process from the medical-legal process, including the determination of PD (e.g., Nevada).
- Education/training on RTW should be provided to all stakeholders of the workers' compensation system, particularly small businesses.
- The State needs to be involved in the RTW process providing funding, coordination, information and training.
- Consider including the services of a RTW counselor, ombudsman, or specialist.
- Outcomes on RTW should be tracked, and performance measures for the RTW counselor established.
- Employers should be required to justify why transitional duty is not available (ADA model).

Meeting Conclusion

The meeting concluded with the understanding that all input from participants would be collected for continued review of technical adjustments and broader systemic challenges of RTW. CHSWC Executive Officer Christine Baker thanked the attendees for their contributions to and participation in the CHSWC Return-To-Work Roundtable.

Next Steps

- Develop legislative proposals to carry out short-term recommendations for technical changes.
- Continue to research, analyze and develop alternative proposals to carry out the long-term recommendations.

Attachment A

Return-to-Work Legislative Changes

1. Return-to-Work Adjustment – Tiered

PD Benefit - Labor Code Section 4658

The tiered permanent disability (PD) benefit system provides for 15 percent increase or decrease in the weekly PD rate depending on whether or not the employer offers return-to-work (RTW), if the employer employs 50 or more employees:

- If an employer does not offer the injured employee regular, modified, or alternative work lasting a year within 60 days of the permanent and stationary (P&S) date, each remaining PD payment to be paid will be increased by 15 percent.
- If the employer offers regular, modified, or alternative work lasting at least a year, each remaining PD payment will be decreased by 15 percent regardless of whether the injured employee accepts or rejects the offer.
- If regular, modified, or alternative work is provided but later terminated by the employer before the end of the period for which PD payments are due, the remaining weeks of the PD benefit from the time of termination are increased 15 percent above the base rate. An employee who voluntarily terminates employment shall not be eligible for payment per Labor Code Section 4658 (d) (3) (B).

Effective Date

Labor Code Section 4658 amendments by SB 899 apply to injuries occurring on or after the date of the revised schedule, effective January 1, 2005, per Labor Code Section 4660 and to injuries occurring before 2005 unless one of the exceptions listed in Section 4660 applies.

Definition of Modified and Alternate Work

Labor Code Section 4658.1 is added by SB 899 to define regular, modified, and alternative work. Definitions of modified and alternate work require at least 85 percent of time-of-injury earnings and location at a reasonable commute distance from employee's residence.

2. Return-to-Work Reimbursements for Worksite Modifications

Labor Code Section 139.48 provides that:

- The RTW program shall be implemented to the extent funds are available. (Its funding source is from Section 5814.6 penalties and from transfers by the Administrative Director (AD) from the Workers' Compensation Administrative Revolving Fund WCARF per Section 62.5.)
- The program will reimburse up to \$1,250 of expenses to accommodate a temporarily disabled worker or \$2,500 to accommodate a permanently disabled worker.
- Only private employers with 50 or fewer full-time employees are eligible for reimbursements from the program.

Vocational Rehabilitation Legislative Changes / Supplemental Job Displacement Benefit (SJDB)

Vocational Rehabilitation Reforms

The change in Assembly Bill (AB) 749 (2002) to the vocational rehabilitation program permitted employees to settle their entitlement to vocational rehabilitation benefits for up to \$10,000. AB 227 (2003) provides for the following changes:

- New Labor Code Section 139.5 repeals workers' compensation vocational rehabilitation.
- Employees with dates of injury prior to January 1, 2004, shall be entitled to continuing services until they are concluded, but such services shall not be provided to employees with a date of injury on and after January 1, 2004 (Labor Code Section 139.5).

New Supplemental Job Displacement Benefit

- New Labor Code Section 4658.5, created by AB 227, establishes a new supplemental job displacement benefit (SJDB) with savings from the repeal of vocational rehabilitation.
- Labor Code Section 4658.5 provides that employees who do not return to work for their employer within 60 days of the end of the temporary disability (TD) period will receive a voucher of:
 - \$4,000 for permanent partial disability PPD of less than 15 percent;
 - \$6,000 for PPD between 15 percent and 25 percent;
 - \$8,000 for PPD between 26 percent and 49 percent; and
 - \$10,000 for PPD between 50 percent and 99 percent.
- The voucher must be used at state-approved or accredited schools for education-related retraining or skill-enhancement, or both. Up to 10 percent of SJDB can be used for counseling. (Labor Code Section 4658.5)
- The AD shall issue regulations governing the form of payment and other matters related to the proper administration of the benefit. (Labor Code Section 4658.5) Regulations have been issued and were effective August 1, 2006. (Title 8, California Code of Regulations, Sections 10133.50 - 10133.60)
- Within 10 days of the last payment of TD, the employer must give notice to the injured worker of availability of the benefit. (Labor Code Section 4658.5)
- The employer will not be liable for the SJDB if the employer offers M/A work within 30 days of the end of TD or the injured worker returns to work for the employer within 60 days of the end of TD. (Labor Code Section 4658.5)

Attachment C

CHSWC Return-to-Work Roundtable Meeting Agenda

Date: Friday, November 17, 2006

Time: 9:00 am – 1:00 pm

Place: Elihu Harris State Building, 2nd Floor, Room 12
1515 Clay Street
Oakland, CA 94612

- I. Introductions
- II. Identify issues involving Return-to-Work
- III. Review statutory changes in Workers' Comp and FEHA/ADA/ Workers' Compensation goals and requirements.
- IV. Identify potential solutions
- V. Evaluate/prioritize solutions
- VI. Next steps

**CHSWC RTW Roundtable Attendees
Oakland - November 17, 2006**

Al Thomas
PG&E

Allen Davenport
SEIU California State Council

Angie Wei
California Labor Federation, AFL-CIO

Brenda Ramirez
California Workers' Compensation Institute

Bonnie Bradt
AIG

Brad Cleveland
SEIU Local 616

Debbie Weinberger
AIG

Holly Hayashida
Department of Industrial Relations, Office of the Director

James Gross
Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP

Joe Carresi
Southern California Edison

Juliann Sum
UC Berkeley, Institute of Industrial Relations

Kathye Mathews
Abbot Vascular

Kenneth Roy
AIG Claim Services

Lori Kammerer
Kammerer and Company representing Concentra, Medex and Building Contractors

CHSWC RTW Roundtable Attendees
(continued)

Mark Gerlach
California Applicants' Attorneys Association

Mark Sektnan
AIG Claim Services

Mark Webb
Employers Direct

Mary King
20th Century Fox

Myron Ko
PG&E

Nanette GoldbergHauser
Southern California Edison

Pearl Phoenix
The Zenith Insurance

Phil Millhollon
California Self-Insurers Association

Rick Giari
Department of Industrial Relations, Return-to-Work

Saul Allweiss
Law Offices of Saul Allweiss representing Safeway and Republic Indemnity

Scott Hauge
Cal Insurance & Associates representing Small Business California

Seth Seabury
RAND

Sharon Douglas
RehabWest, Inc.

Sharon Faggiano
EIG Insurance

CHSWC RTW Roundtable Attendees
(continued)

Steve Wiesner
Kaiser Permanente

Suzanne Guyan
SM Guyan & Associates representing CCWC

CHSWC Staff

Christine Baker
Lachlan Taylor
Irina Nemirovsky
Chris Bailey
Selma Meyerowitz

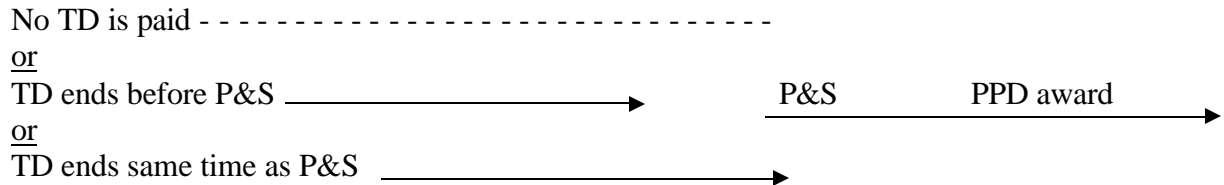
CHSWC Consultant

Juliann Sum, UC Berkeley

Attachment D

STAGES OF A CLAIM	RTW BENEFITS AND PROGRAMS		
	SUPPLEMENTAL JOB DISPLACEMENT BENEFIT (SJDB)	PD ADJUSTMENT OF 15% (employers with 50 or more employees)	REIMBURSEMENT BY DWC FOR JOB ACCOMMODATIONS (employers with 50 or fewer employees)
Worker does not receive TD benefits (worker works fully while recovering)	??? -- No provisions for workers who do not receive TD benefits		Up to \$1,250 per injured worker
Worker receives TD benefits, which end (can happen before or at same time disability becomes P&S)	Notice of potential right to SJDB <u>within 10 days</u> after final TD payment Offer of M/A work <u>within 30 days</u> after final TD payment		
Disability becomes P&S		Offer of R/M/A work <u>within 60 days</u> after P&S	Up to \$2,500 per injured worker
PPD benefits are awarded	SJDB <u>within 25 days</u> after PPD award (if no offer of work within 30 days after final TD payment and injured worker does not RTW within 60 days after final TD payment)		

Timing of Return-To-Work Benefits



SJDB is based on timing of TD payments and PPD award:

- Notice of potential right to SJDB within 10 days after final TD payment
- Offer of M/A work within 30 days after final TD payment
- Eligible for SJDB if no offer of work within 30 days after final TD payment and injured worker does not RTW within 60 days after final TD payment
- SJDB within 25 days after PPD award

PD adjustment of 15% is based on timing of P&S:

- Offer of R/M/A work within 60 days after P&S
- 15% adjustment in PD based on whether offer was given within 60 days after P&S
- Applies to employers with 50 or more employees

Reimbursement by DWC for job accommodations for temporary and permanent work restrictions:

- Up to \$1,250 to accommodate temporary work restrictions
- Up to \$2,500 to accommodate permanent work restrictions
- Available to employers with 50 or fewer employees

California Fair Employment and Housing Act (FEHA): Rights and Duties

Interplay Between FEHA and Workers' Compensation

Liability under the California Fair Employment and Housing Act (FEHA) was broadened in 2001 by the Prudence K. Poppink Act (AB 2222). Three years later, workers' compensation vocational rehabilitation services for employees injured in 2004 or later were repealed by SB 899 and replaced with supplemental job displacement benefits. Prior to these legislative changes, vocational rehabilitation services helped employers meet their obligations to find reasonable accommodations under FEHA. As a result of the 2004 reforms, employers are now subject to increased liability under FEHA.

Broadened Scope of FEHA

FEHA is broader in scope than the federal ADA with respect to the range of disabilities that are covered and the employer's obligation to engage in a timely, good faith, interactive process to find reasonable accommodations. Because ADA does not preempt state laws that afford greater protections, FEHA is now the law that primarily concerns California employers.

Disabilities Include Those That Limit Working

The definition of disability was expanded to include physical and mental disabilities that result in a "limitation" upon a major life activity, but not necessarily a "substantial limitation" (which is required under the federal ADA). Working in a particular job or in a class or broad range of jobs is considered a "major life activity." (Calif. Gov't Code section 12926.1)

Separate Liability for Failing To Engage in the Interactive Process

Liability was added for failing to engage in a good faith, interactive process. Employers are required to engage in a timely, good faith, interactive process to determine effective reasonable accommodations, if any, at the request of an employee or applicant with a known disability or known medical condition. (Calif. Gov't Code section 12940) AB 2222 imposes liability on employers that fail to do this.

The burden falls on the employer to prove that the employer has entered into an interactive process with the employee, even if the employer has not violated the ADA.